No. 12766

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN URQUHART BIRNIE, an individual doing business as BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a corporation, and UNITED STATES MARITIME COMMISSION,

Appellees.

Reply Brief on Behalf of Appellant, John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company.

HILL, FARRER, & BURRILL,
ELLIOTT H. PENTZ,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for Appellant John Urquhart Birnie.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Preliminary Statement.

Permanente has placed its case squarely upon the single proposition that Birnie must fail because the Prime Contract was not executed by the Secretary of the Navy.

Regarding the effect of Section 401 of the Revenue Act of 1940, the question has become whether the sort of vessel constructed is determinative of that section's applicability, or whether, on the contrary, the formal party signatory to the prime contract under which the vessels were constructed is the final criterion.

ARGUMENT.

I.

Naval Vessels Are Naval Vessels Regardless of Who Builds Them; and the Purpose of Both the Vinson-Trammel Act and the Revenue Act of 1940 Would Be Nullified Were Those Acts Limited Only to Contracts in Which the Secretary of the Navy Appear as a Party Signatory.

Permanente does not actively dispute the claim of Birnie that the vessels in question were constructed to fill Navy needs, were delivered to the Navy, were used by the Navy in the prosecution of the war. In passing, it accepts these matters. It says, however, that they make no weight in this litigation because the prime contract under which the vessels were constructed was not signed by the Secretary of the Navy and that the Vinson-Trammel Act and the suspension thereof contained in Section 401 of the Revenue Act of 1940 are applicable only to cases where the prime contracts are signed personally by the Secretary of the Navy.

In so far as the Vinson-Trammel Act is concerned, this is an unduly and unwarrantedly narrow construction, The *Pressed Steel Tank* case (*Pressed Steel Tank Co. v. Commissioner of Internal Revenue,* 133 F. 2d 716) shows that, in so far as the applicability of the Act depended upon the sort of work done, the Act has been given no narrow construction. The *Aluminum Company* case (*Commissioner of Internal Revenue v. Aluminum Company of America,* 142 F. 2d 663) shows that, in so far as

the applicability of the Act depended upon the form or classification of the contract for work, the Act has been given no narrow construction. The Treasury Regulations, issued pursuant to the Act, and approved in the *Aluminum Company* case, push the applicability of the Act to its uttermost limits in their inclusion of materialmen as subject to the Act.

True enough, the cited cases, the other cases cited in Permanente's Brief, and the Regulations have reference to contracts with the "Secretary of the Navy". However, the contracts in all those cases and the Regulations greatly antedate the late great war, the tremendous naval expansion necessarily incident thereto, and the emergency methods of fulfilling the needs of national defense. References in those cases and in those Regulations, made in quieter days, to the Secretary of the Navy, are by no means applicable to the hectic days of national emergency nor to times when the problem was getting things done, not the formal manner in which they were done.

Such is the meaning, and the pertinence to this case, of the *Northern Pacific* (*Northern Pacific Railway Co. v. United States of America,* 330 U. S. 248, 91 L. Ed. 867) and *Southern Pacific* (*Southern Pacific Company v. Defense Supplies Corp.,* 64 Fed. Supp. 607) cases. There the argument of formalism was urged; the shipments in question were not consigned to or shipped by Army or Navy authorities. The Supreme Court in the *Northern Pacific* case specifically rejected such an argument. It held that the applicability of the land-grant statute de-

pended upon the realities of the situation, upon whether the property was actually destined for actual use by the military or naval forces. The profit limiting provision of the Vinson-Trammel Act was, and still is, like the land-grant statute, a provision for the benefit of or protection to the Government.

The profit limiting provision of the Vinson-Trammel Act speaks for itself, is so far as its meaning and purpose is concerned. It limits profits on naval construction so that the building of the United States Navy shall not afford a source for the making of what Congress has declared to be excessive profits. It is not consistent with that meaning and purpose to confine the applicability of the profit limiting provision only to Naval Construction contracts to which the Secretary of the Navy alone was a party signatory, and to no others. Neither the *Pressed Steel Tank* case, nor the *Aluminum Company* case, nor the *Northern Pacific* case, support such a narrow interpretation.

The House Committee which prepared and presented for Congressional approval Section 401 of the Revenue Act of 1940 shows, in its report, that the Vinson-Trammel Act was not regarded as having any narrow effectiveness. Its report shows that the Act was considered to be applicable to "naval construction" without limitation. Likewise, the report shows that the general applicability of the Act to naval construction was proving a hindrance to a naval construction program. The enterprising builder, constructor, or manufacturer could do better profitwise in

other fields of endeavor, even though in the fields of national defense. Finally, the report shows that Section 401 was designed to accomplish two purposes: First, to remove the hindrance to naval construction which the Vinson-Trammel Act was proving to be; second, to place everyone, taxwise, on the same footing, whether his income arose from public or private contracts. It was no longer to be a forbidden thing to make more than ten per cent profit on naval construction; but such profits as the naval constructor might make were to be subject to the general wartime tax rates and thus no one gain unfair advantage.

Section 401 of the Revenue Act of 1940, while codified in Title 34 of the U. S. Code, is not an amendment to the Vinson-Trammel Act. It is simply and solely a provision of that Revenue Act having for its purpose the suspension for a time of the Vinson-Trammel Act, and the prohibition for a time of the profit-limiting scheme there provided for.

Just as much as the Vinson-Trammel Act specified the policy of Congress in respect to naval construction for the period from 1934 to 1940 and for years subsequent to 1945, so does the Revenue Act of 1940 specify the policy of Congress in respect to naval construction for the period with which we are here concerned.

That policy and the resultant rule is that any agreement to pay into the Treasury profit in excess of ten per cent "shall be without effect."

Here are vessels built to fill urgent needs of the United States Navy, delivered to the United States Navy, commissioned by the United States Navy, used by the United States Navy for months of wartime activity, and still in the possession of the United States Navy, except for two. Some $34,000,000 of Navy funds went into their construction.

Permanente would have it that all this is not germane, is wholly immaterial, because the prime contract does not show the Secretary of the Navy as the party signatory. Looked at to determine the applicability of the profit-limiting provision of the Vinson-Trammel Act, it would seem clear beyond doubt that this was the very type and kind of construction the Act was meant to cover. Looked at to determine the applicability of Section 401 of the Revenue Act of 1940, it would seem clear beyond doubt that this was the very type and kind of construction into which it was intended to encourage builders to enter by suspending the Vinson-Trammel Act. It cannot realistically be important who was the formal party signatory to the prime contract.

II.

The Effect of Public Law 5 and Section 4 Thereof Is to Make the Maritime Commission Subject to the Same Restrictions on Its Authority as Is the United States Navy.

Permanente does not, and a reading of the statute will show that it cannot, urge that these vessels were built pursuant to the authority granted to the Maritime Commission in the Merchant Marine Act of 1936. The authority of the Commission is declared in Prime Contract MCc-15762 to be Public Laws 247 and 630, both of which are appropriation acts.

Permanente says that those two laws, through their adoption of Public Law 5, show that the Commission in constructing the vessels in question operated in accordance with its own functions as a separate instrumentality of the government, entirely separate and distinct from the Navy Department.

But Permanente, through silence, avoids facing the clear and important meaning of Public Law 5, wherein the Commission is authorized to construct and repair and outfit vessels for any other department or agency of the government *to the extent that such other department or agency is authorized by law to do so for its own account.*

In the trial court and again before this Honorable Court, Permanente has shunned it. This continuing evasion reflects its inability to furnish an answer to this implicit dictate of the statute. Again we say that if the Secretary of Navy was without authority to require the inclusion of the ten per cent recapture clause, and had the Secretary of Navy included the same it would have been without effect, then neither the Commission nor Permanente had authority to include this recapture clause, and

in so doing the same was without effect. Certainly, neither the Commission nor Permanente stands in any better position than the Secretary of Navy with regard to Special Provision No. 4. To conclude otherwise is to avoid the manifest and unmistakable limitation of the Commission's authority as contained in Public Law 5.

Conclusion.

Again, we respectfully submit that this Court should reverse the judgment of the District Court and direct that judgment be entered in favor of Birnie. In closing, we makes this answer to the protestations of Permanente against war profiteering. The Department of Internal Revenue is well able to take care of the matter of excessive profits. Indulging in an understatement, its high surtaxes were and indeed still are adequate. Birnie seeks to avoid discrimination against builders of naval ships which would otherwise result should Permanente's contentions prevail, and which would, we submit, be in direct violation of the clear dictates of Congress that such discrimination should not occur. Birnie seeks to apply against these profits such of his losses as are applicable. This is a privilege enjoyed by all others engaged in the war effort and to which, we respectfully submit, he is likewise entitled.

Respectfully submitted,

HILL, FARRER, & BURRILL,
By ELLIOTT H. PENTZ,
Attorneys for Appellant John Urquhart Birnie.